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LIU THIAN LEONG & ORS

v.

JEE NYEN CHONG & ORS AND OTHER CASES

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HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[CIVIL SUITS NO: 22-228-2010; 22-229-2010 & 22-230-2010]
7 JANUARY 2013

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TORT: *Defamation - Libel - Publication of defamatory article in local newspaper by office bearers of registered society in their official capacity - Whether caused misunderstanding, dissatisfaction and hatred - Test for determining whether alleged statements were defamatory - Whether defendants merely replying to press statement made by plaintiffs - Whether defendants had transgressed realm of a proper reply by making unnecessary imputation - Whether*

D

defence of qualified privilege applied - Whether defence of fair comment applied - Whether defendants liable in personal capacities

TORT: *Defamation - Defences - Fair comment - Elements to be established - Publication of defamatory article in local newspaper - Whether defendants merely*

E

replying to press statement made by plaintiffs - Whether public interest element lost when making scurrilous attacks against plaintiffs - Whether statements untrue

TORT: *Defamation - Defences - Qualified privilege - Publication of defamatory article in local newspaper - Whether defendants merely replying to*

F

press statement made by plaintiffs - Whether defendants had transgressed realm of a proper reply by making unnecessary imputation - Whether privilege lost

CIVIL PROCEDURE: *Parties - Societies - Defamatory statement made by office bearers of registered society in their official capacity - Whether defendants*

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liable in personal capacities - Societies Act 1966, s. 9(c)

The villagers of Siburan had set up an association known as Siburan Village Hall Committee ('the society') which was registered with the Registrar of Societies in 1973. The membership to the society was open to any persons from Siburan Village or any neighbouring villagers.

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Application for admission had to be proposed and seconded by two existing members of the society. The executive committee ('EC') of the society had the absolute discretion to reject any application without assigning any reason therefore. The society constructed a three storey building, with an open multi purpose hall which was to be open for use

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by the villagers. Over the years, membership of the society had dwindled from 20 to 10 persons in 2010. The EC was accused of parachoism and discrimination in the usage of the hall. A letter of appeal was signed by 190 residents demanding that the hall be opened up for

use of the Siburan villagers and to be admitted as new members of the society. Pursuant to a dialogue held in the presence of Dr Jerip Susil, a member of the State Legislative Assembly, the villagers, the EC and the chairman of the EC (Penghulu Boon Jim Lim (since deceased)), a sub-committee was established to look into the recruitment of new members and to open up the use of the hall. However, despite this, all 50 new applications received for membership of the society were rejected by the EC. The three plaintiffs held a press conference highlighting this rejection. The EC, in reply, released a press statement titled "notification" stating that the statements issued by the plaintiffs were misleading and had caused misunderstanding, created dissatisfaction, hatred amongst the people in the village and damaged the reputation of the EC. The plaintiffs commenced the present action asserting that the notification was defamatory of them and claimed for damages. The defendants denied that the words in the notification were defamatory and alternatively, pleaded the defences of qualified privilege and fair comment. The defendants also claimed that they could only be sued and be found liable in their official capacities as EC members but not in their personal capacities since s. 9(c) of the Societies Act 1966 provides that a society registered under the Act can sue and be sued in the name of its office-bearers.

Held (holding defendants liable in their official capacities):

(1) In respect of an action for libel, whether the alleged words were defamatory is both a question of law and fact. In deciding this primary issue, the court has to: (i) decide, as the first step, whether the words complained of are capable of bearing a defamatory meaning; and (ii) if they are, then only would the court decide if the words are in fact defamatory of the plaintiff (*Chok Foo Choo v. The China Press Bhd;* refd). (para 21)

(2) The alleged defamatory words had to be considered in the context of the whole notification. The words in their literal, natural and ordinary form could only mean that the plaintiffs had, by the alleged misrepresentation and the falsity of their press statements, caused the feelings of negativity described in the first paragraph of the notification. The inescapable and reasonable implication flowing from that statement would be that the plaintiffs were dishonest and irresponsible trouble-makers out to sow the seeds of discontent among the villagers towards the EC. Thus, the words in the notification were indeed capable of a defamatory meaning described to them by the plaintiffs. Such accusation would of course lower them in "the estimation of the right-thinking members of society", in particular those from Siburan village. (paras 23-25)

(3) The plaintiff had not just raised the issues of the membership application and the use of the hall at the press conference but had demanded for an explanation from the EC on the issues raised. Thus, there was a duty to explain the defendants' stand on the issues raised. However, the defendants had transgressed the realm of a proper reply by making counter-charges or unnecessary imputation. In the first opening paragraph of the notification, instead of just explaining, the defendants accused the plaintiffs of causing misunderstanding, creating dissatisfaction and hatred among villagers of Siburan. The negative imputations of this statement on the characters of the plaintiffs in that reply was wholly unnecessary and irrelevant to the vindication. (paras 31-33)

(4) Due to the press conference, the notification was a matter which was in the public interest. The publication of that defence in public was made in an occasion which was privileged but in the context of this case, when that defence came outside the ambit of a proper reply, the privilege was lost. (para 36)

(5) The four ingredients which the defendants had to establish to succeed in their defence of fair comment were: (i) that the words in the notification was on a matter of public interest; (ii) that the words in the notification were not statement of facts but comment; (iii) that the facts upon which the comment was based were true; and (iv) that the words in the notification were fair. (para 39)

(6) The plaintiffs' press conference airing their grievances about the EC deserved a public reply from the defendants. However, this did not extend to making scurrilous attacks against the plaintiffs. Hence, the public interest element failed. The words in the notification were clearly allegation of facts made against the plaintiffs for causing dissension and inciting hatred amongst the people of Siburan against the EC. The statements could not be true. (paras 40 & 43)

(7) Unlike in a defence of qualified privilege, for malice in fair comment, the plaintiffs need not prove motive for the publication. All that mattered was whether or not the commentator believed in the truth of his comment. When raised in a defence of qualified privilege, malice can be defeated by proof that the defendant used the occasion for some purpose other than that for which the occasion was privileged. The EC was under siege. Their management of the society had been questioned in the press conference. Their right to the freedom of speech allowed them to make a rebuttal using the same channel as the attack launched against them by the plaintiffs, *ie*, in the newspapers. Thus, there was no doubt as to their honest belief in making that rebuttal. Their conduct in doing so was not an expression of ill-will against the plaintiffs. (paras 53, 54 & 56)

(8) In considering the quantum of damages, the court must not be guided solely by the plaintiffs' standing in society but the extent of the publication as well, which in this case was only carried by two local Chinese newspapers and would be generating interest primarily within the people of Siburan. Further, the sting of the accusation in the notification was not so grave and serious as to be accused of a criminal offence such as murder or robbery. (para 59)

(9) The defendants should not be made personally liable for the defamatory statement in the notification as right from the start the decision to publish it was a joint decision of the EC. Though the notification was drafted by Voon Sam Ted, the EC met and agreed with the draft – again it was a collective decision which exonerated the defendants personally *(Ling Kiong Tieng @ Ling Hie Sing v. Wong Lieng Kiong & Ors;* refd). (para 64)

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***
Albert Cheng & Lam Yuk Wah v. Tse Wai Chun Paul [2000] 3 HKCFAR 339 ***(refd)***
Chok Foo Choo v. The China Press Bhd [1991] 1 CLJ 461 CA ***(refd)***
Cohen v. Daily Telegraph Ltd [1968] 2 All ER 409 ***(refd)***
DP Vijandran v. Karpal Singh & Ors [2000] 6 CLJ 433 HC ***(refd)***
Dwyer v. Esmonde [1877] Ir 11 CL 542 ***(refd)***
Harbour Radio Pty Limited v. Trad [2012] HCA 44 ***(refd)***
Henry Wong v. John Lee & Anor [1980] 1 LNS 27 HC ***(refd)***
JB Jeyaretnam v. Goh Chok Tong [1984] 1 LNS 139 HC ***(refd)***
Joseph & Others v. Spiller & Anor [2010] 3 WLR 1791 ***(refd)***
Joynt v. Cycle Trade Publishing Co [1904] 2 KB 292 ***(foll)***
Kimsley v. Foot [1952] AC 345 ***(refd)***
Ling Kiong Tieng @ Ling Hie Sing v. Wong Lieng Kiong & Ors [2010] 1 LNS 1759 HC ***(foll)***
Loveday v. Sun Newspapers Ltd [1938] 59 CLR 503 ***(refd)***
Penton v. Calwell [1945] 70 CLR 219 ***(refd)***
Reynolds v. Times Newspapers Ltd [2001] 2 AC 127 ***(refd)***
Sarawak Time Ltd & Ors v. Tan Too Yam [1960-1963] SCR 221 ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 HC ***(refd)***
Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***
Turner v. MGM Pictures Ltd [1950] 1 All ER 449 ***(refd)***
Watt v. Longsdon [1930] 1 KB 130 ***(refd)***

Legislation referred to:

Defamation Act 1957, s. 12(3)
Evidence Act 1950, s. 134
Societies Act 1966, s. 9(c)

A *For the plaintiffs - Chong Siew Chiang; M/s Chong Brothers, Advocs*
For the defendants - Henry Ling; M/s Ling & Wong, Advocs

Reported by Amutha Suppayah

B

JUDGMENT

Rhodzariah Bujang J:

[1] Half a century ago, Siburan was just a village laying at the
C outskirts of Kuching but it is now a thriving town with a predominantly Chinese population. Almost that many years ago, its villagers realised their good intention to set up an association, appropriately named as Siburan Village Hall Committee ('the society') which was registered with the Registrar of Societies in 1973. In its rules and regulations,
D the objectives of the society are stated as follows:

(a) To collect sums of money and fund by way of contributions, subscriptions, donations, legacies, grants and any other lawful methods for the purposes of purchasing or leasing land and building thereon a Village Hall and such other necessary buildings
E as may be appropriate for the use of such hall or buildings by the community in Siburan Village.

(b) To provide and to maintain the Village Hall or buildings for the holding of exhibitions, meetings, gatherings, lectures classes and indoor games.

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(c) To provide for the benefit of the inhabitants of Siburan Village and its neighbourhood without distinction of sex, of political or of creed or race, goodwill in the form of social intercourse/ gatherings and friendly competition through indoor games.

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(d) To encourage the residents of Siburan Village to take an active interest in the civic, physical and moral welfare of the community.

(e) To maintain and manage, or to co-operate with any local statutory authority in the maintenance and management of such a hall for activities promoted by the society of the above objects.

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(f) To do all such lawful acts or things as are incidental or conducive to the attainment of the above objects or any of them.

[2] It is further stated in the rules (r. 3(a)) that the membership to
I the society is open to any persons from "Siburan Village or any neighbouring villagers, who is interested in the objectives of the society irrespective of race, sex, religion or political affiliation". But there are requirements for admission, the first of which is that such an application

must be proposed and seconded by two existing members of the society, forwarded to the secretary and secondly, the management board of the society described in the rules as the "Executive Committee" has the absolute discretion to "reject any application without assigning any reason therefore" (r. 3(b)). This particular r. 3(b) would, as the events unfold in this case, assumed great importance and would be further mentioned in this judgment.

[3] As with any associations, the society's Executive Committee consists of a chairman, a vice-chairman, an honorary secretary, an assistant honorary secretary, a treasurer, an assistant treasurer and five ordinary members. (r. 6(a)).

[4] After its registration, the society constructed a three storey building, funded by a government grant and donations from the public. The office of the society is located there and so is the branch office of SUPP (Sarawak United People's Party), a political party which is a member of the ruling coalition, Barisan Nasional. Annexed to the building is an open multi purpose hall which also doubles as a basketball court. Just like the membership, the hall is open for use, said the Executive Committee, by the villagers upon application made to them and payment of rental. That was not so, cried certain quarters in the village as from an initial membership of twenty persons, the same has dwindled to only ten in 2010, and worse the Executive Committee was accused of parachoism and discrimination in the usage of the hall.

[5] Matters came to a head with the death of a young female basketballer by the name of Chong Shien Chien. It was contended by these same quarters that as a result of being unable to use the society's hall for training, she had to travel to another nearby village called Beratok and met with a fatal accident upon her return from training. That incident allegedly sparked an outrage among the villagers, as a result of which the Executive Committee found themselves staring at a letter of appeal signed by 190 residents demanding that the hall be open up for use of the Siburan villagers and to be admitted as new members of the society. At the initiative of one Dr Jerip Susil who was then and still is at the time of writing this judgment, a member of the State Legislative Assembly, a dialogue was held on 30 April 2008 between the villagers and the Executive Committee, then headed by one Penghulu Boon Jim Lim (since deceased) regarding the issues raised in the appeal letter. It was agreed at that meeting that a special sub-committee be established to look into, *inter alia*, the recruitment of new members and to open up the use of the hall. That sub-committee was formed on the same day with one Liu Thian Leong as chairman, Chang Hon Hiung as secretary and Liew Kuet Min as treasurer. Following that meeting a total of 50 applicants submitted, on various dates in May 2008 right up

to May 2009 their applications to be members of the society. Amongst the applicants were also Liu Thian Leong, Chong Jit Leong and Chang Hon Hiung. These three prominent sons of Siburan have by their own statements made it good in business and have given their fair share of contributions to the socio-economic and political landscape in Siburan and in the case of Liu Thian Leong, even further than the village. The 50 applications were rejected by the Executive Committee. The applicants then resubmitted in their applications which were also rejected in early January 2010. They were allegedly told by the Executive Committee to take back their fees of RM100 each but only some did, the rest did not.

[6] Frustrated with this turn in the event and smarting from the alleged failed promise made by Penghulu Boon Jim Lim that their applications for membership would definitely be approved, the three named persons above took it upon themselves to champion their cause and that of the other applicants by going to the Chinese press.

The Press Conference

[7] This was held on 22 July 2010 and received wide coverage in The International Times, Sin Chew Jit Poh, United Daily News and See Hua Daily News in their respective publications on 23 July 2010. In fact, International Times and United Daily News deemed it fit to run the same story about the frustration of the aspiring members again on 25 July 2010 and 7 August 2010, respectively.

[8] The Executive Committee did not take all these bad publicity lying down. They met to discuss the matter and came up with a joint decision to issue a rebuttal of their own to the newspaper. It was in the form of a press statement drafted by its secretary, Voon Sam Ted, and titled "Notification". Sin Chew Daily News published it on 6 August 2010 and See Hua Daily News on 7 August 2010. In the said notification they explained that the statements issued by the three named persons were misleading and had caused misunderstanding, created dissatisfaction, hatred amongst the people in the village and damaged the reputation of the Executive Committee. They explained further that the membership application did not comply with the procedure of the society and did not bear its common seal. They invited the applicants to claim back their refund of RM100 (per applicant) from the Executive Committee.

[9] The notification so outraged these three named persons that they have each commenced a separate action against the Chairman of the society, Jee Nyen Chong, its secretary, Voon Sam Ted and treasurer, Chong Vui Kuet for libel but which actions proceeded as one trial before me.

[10] The defendants have denied the words in the notification were defamatory of the three plaintiffs and also contended that the action should not have been commenced against them personally. The usual defence of qualified privilege and fair comment made without malice upon a matter of public interest were also raised in their statements of defence which were identical in substance, as were the statements of claim of the plaintiffs. So it came to be that the death of the young basketballer had become a catalyst for and given birth to these three actions.

The Death Of The Young Basketballer

[11] I cannot run away from mentioning this tragic event for almost without exception, all the plaintiffs, the defendants and their witnesses referred to it in their testimonies. The plaintiffs and their witnesses alleged that she had been prevented from practicing at the hall and this led to the fateful decision to go to Beratok village to play. But, to the credit of the defendants, her mother and her basketballer friend came to testify at the trial, vehemently denying the allegation of the plaintiffs – the decision to play at Beratok village was an initial and original plan, not an alternative one. So who do I believe? The mother and her friend of course since they were closest persons to her at that material time. The plaintiffs and their witnesses were not even known to her personally and what they said about her death, in the face of her mother's and friend's testimonies, came across strongly as rumour mongering at its worst. Therefore, I would have to conclude that indeed that allegation surrounding her death as stated by the plaintiffs at the press conference was false.

The Membership Applications

[12] At the risk of being accused of being morbid, I would again have to mention about another death – that of Penghulu Boon Jim Lim only because the witnesses at the trial, particularly the plaintiffs, relied so much on the concurrence made by him at that special meeting chaired by YB Jerip Susil on the establishment of the special sub-committee and the assurances he allegedly made that all new membership applications will be accepted by the Executive Committee. The late Penghulu would have been the best person to corroborate what transpired at that meeting but I am not so handicapped by his absence because there was a minutes of meeting taken (exh. P5 B at pp. 22 to 23 of the plaintiff's bundle of document marked as bundle D) which confirmed what actually transpired and what were agreed then as contended by the plaintiff. Further, YB Jerip Susil who testified at the trial, confirmed the said minutes and he was, more importantly, a co-signatory of the minutes.

[13] The defendants, on the other hand had through the evidence of the defendants denied the authority of Penghulu Boon Jim Lim to represent the Executive Committee and the society at the said meeting chaired by YB Jerip Susil. In their testimonies in court all pointed out r. 3(b) of the society's rules and regulations which I have quoted on the first page of this judgment on the absolute discretion of the Executive Committee to reject such membership applications without giving reasons.

[14] Jee Nyen Chong (DW15), the present chairman of the society and its then secretary, whose name appeared in the list of the special sub-committee's members have denied in cross-examination that he attended the sub-committee meeting as a representative of the Executive Committee together with the late penghulu or that it was even a formal meeting (he said it was just a dinner). However, the minutes of the joint meeting (exh. P5B) as confirmed by Dr Jerip Susil and the letter of authorisation to the special sub-committee to recruit new members co-signed by him (exh. P7) and the late penghulu are to me proof on a balance of probability that there was such a sub-committee authorised by the Executive Committee.

[15] Jee Nyen Chong also confirmed in cross-examination that he had in his possession RM5,000 in membership fees given at the second sub-committee meeting held on 9 May 2008 which he acknowledged receipt on the last page of exh. P6 (the list of the 50 applicants) and he said RM2,000 had been subsequently returned to the applicants but he still kept RM3,000, shockingly I must say, under his bed. Had there not been such a sub-committee, there would not have been a sudden surge of membership applications and much less, a reason for him to keep the said money.

[16] Though I acknowledge that the Executive Committee is vested with such absolute power, I could not ignore the fact that the setting up of the special sub-committee with the blessing of the late penghulu has created a legitimate expectation in the minds of the aspiring members that their applications would be met with approval. Given the Executive Committees' inertia over the issue, no one could have faulted the plaintiffs' frustration although venting it to the press is another matter altogether. Whether what they said at the press conference was justified or was fair comment, that would have to be decided in the trial of the counterclaim of the defendants if the plaintiffs failed to overturn the decision of the Court of Appeal which had allowed the appeal against my decision to strike out the said counterclaim. (The plaintiffs, it is to be noted, have obtained leave to appeal to the Federal Court against the said decision of the Court of Appeal).

[17] The laying out of these facts would not be complete without me mentioning that the defendants have adduced evidence to show that three out of the 50 named applicants who submitted the forms in fact did not do so. In fact, the defendants' counsel, Mr Henry Ling informed the court earlier that five, not just three of these applicants would come to court to deny that they have made such applications but as I indicated to him after the three have given evidence, two more would just be a question of numbers which would not count too much with me because it is trite law that evidence is to be weighed, and not counted. (see s. 134 of the Evidence Act 1950). In the context of this case unless all of the applicants come forward to give the same evidence, it makes not much of a difference if three came and not five. These three applicants testified that they did not sign the said application forms though admitting that their personal details in the forms were correct when cross-examined by Mr Chong Siew Chiang and Mr Alvin Yong who also acted for the plaintiffs. Of course no handwriting experts were called to give evidence on the genuineness of their signatures in the forms. Without the assistance of such expert evidence, I am inclined to think that it is improbable that anyone could obtain their personal particulars and forged their signatures on the forms just for the purpose of bolstering the number of applicants to the society. I take the view therefore that there were indeed these number of applicants who were interested to join the society at that material time.

[18] I have decided to lay out these pertinent background facts in order for a reader of this judgment to better appreciate the issues raised at the conclusion of the trial and the first issue is the most basic – are the words in the notification defamatory of the plaintiff?

Defamatory Words

[19] The notification, which translation into English at pp. 32 and 34 of Bundle D (exh. P10A and P2A, respectively) is quite short and on account of that I have taken the liberty to reproduce it below:

> (i) The well-known state Chinese educational and political leaders Liu Thian Leong and Chang Hon Hiung on 23 July 2010 in local presses International Times, Sin Chew Daily, United Daily News and See Hua Daily News as well as Chong Jit Leong on 25 July 2010 in International Times published misleading statements and claimed to take legal action against this committee within seven days. It has caused misunderstanding and created dissatisfaction and hatred among villagers of Siburan thereby seriously damaged the reputation of this committee. If it leads to any serious consequences, Liu Thian Leong etc, should be held fully responsible.

A (ii) The membership applications submitted by those headed by Liu Thian Leong are not issued by this committee and do not include its common seal and hence do not comply with the membership application's procedure. Therefore this committee has decided to reject them after a meeting which also resolved unanimously to refund the entrance fee of RM100 each.

B (iii) This committee reserves the right to take legal actions against the statements published by Liu Thian Leong, Chang Hon Hiung and Chong Jit Leong.

(iv) There are many applicants who have voluntary taken back the C refund of RM100 each at present. The remaining applicants may claim for refunds at the committee's secretarial within two weeks from the date hereof until 19 August 2010.

(v) This committee is a legal organisation and all its activities including administrative and financial matters are executed D according to its constitutions and in accordance with the rules of Registrar of Societies. This committee is responsible to its valid members and the Registrar of Societies and not to Liu Thian Leong, Chang Hon Hiung and Chong Jit Leong nor reporting to them.

E **[20]** Mr Chong Siew Chiang, no stranger to this area of the law, having represented quite a number of litigants in defamation cases and personally being a litigant himself in this kind of cases have put up a 71 pages submission at the close of the trial and devoted ten pages of it on this issue. Mr Henry Ling's written submission in reply is even F longer – 121 pages though only about five pages are on this issue alone. I am greatly assisted in the writing of this judgment by the diligence as well as the well researched and detailed submissions of both counsels and would pause here to record my sincere appreciation to both of them for their effort.

G **[21]** It is indeed an established principle in defamation law that in respect of an action for libel whether the alleged words are defamatory is both a question of law and fact. I am grateful to Mr Chong Siew Chiang for drawing my attention to the Court of Appeal's case of *Chok Foo Choo v. The China Press Bhd* [1991] 1 CLJ 461; [1999] 1 MLJ 371 H which lays down a two steps approach in deciding this primary issue which are as follows:

(i) Decide, as the first step, whether the words complained of are capable of bearing a defamatory meaning;

I (ii) If they are, then only would the court decide if the words are in fact defamatory of the plaintiff.

The First Step

[22] Since both Mr Chong Siew Chiang and Mr Henry Ling have cited Richard Malanjum J (as His Lordship then was) in the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 406, (of which Mr Chong Siew Chiang acted for the plaintiff), I would be doing justice to both of them by adopting the same case as the starting point of what 'capable' of being defamatory means. His Lordship said, quoting from *JB Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139; [1985] 1 MLJ 334, that the test is "whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man, or would tend to lower the plaintiff in the estimation of the right – thinking members of society generally". His Lordship further cautioned, quoting from *JB Jeyaretnam*'s case again and *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56, that even if the words did not lower the plaintiff in the estimation of those to whom they were published, they could still be defamatory.

[23] In this regard, I also agree with Mr Henry Ling that the alleged defamatory words must be considered in the context of the whole 25 notification as his statement is backed by a long list of authorities which I do not deem necessary to reproduce here.

[24] When I undertake the exercise as recommended by the case authorities just cited above, the words in their literal, natural and ordinary form can only mean that the plaintiffs have by the alleged misrepresentation and the falsity of their press statements caused the feelings of negativity described in the first paragraph of that notification; the inescapable and reasonable implication flowing from that statement would be that the plaintiffs were dishonest and irresponsible trouble-makers out to sow the seeds of discontent among the villagers towards the Executive Committee. Thus, in my view the words in the notification are indeed capable of a defamatory meaning described to them by the plaintiffs.

The Second Step

[25] The said words, I am persuaded to conclude, are indeed defamatory of the plaintiffs because a reasonable reader of the notification would conclude what I have just said above of the plaintiff – that they were, to put it differently, rebel rousers intent on inciting such feelings of ill-will and dissension amongst the good people of Siburan against the Executive Committee. Such accusation would of course lower them in "the estimation of the right-thinking members of society", in particular those from Siburan village.

[26] I will now move to the defences raised by the defendants in this case and they are as stated earlier:

(i) Qualified privilege

(ii) Fair comment

Qualified Privilege

[27] Mr Henry Ling submitted that the notification was published on an occasion of qualified privilege because it was a reply to an attack mounted by the plaintiffs against his clients, quoting from *Duncan & Neill on Defamation*, Third Edition 2009 at para. 16.23 in which it states that a victim of a defamation attack has a legitimate right or interest in defending himself. The learned authors quoted, from *Dwyer v. Esmonde* [1877] Ir 11 CL 542 at p. 550 that such an aggrieved party having an interest in vindicating his character, has a privilege to publish matter of vindication and defence, and all such matter as is material to the public forming such just and true judgment.

[28] Mr Chong Siew Chiang did not disagree with that statement of the law and submitted that even though the aggrieved party (my description, not his, I must add) is entitled to answer such attack to his character or conduct but in doing so "he must not bring fresh accusation or condemnation against his adversary". By way of authority, he has cited *Gatley on Libel and Slander*, 9th edn. at para. 14.63 where it states that a person responding to an attack upon him must not make counter-charges or unnecessary imputations on the private life of the person who has attacked him wholly unconnected with the attack and irrelevant to the vindication. The privilege, according to the learned author, extends only so far as to enable him to repel the charges brought against him – not to bring fresh accusation against his adversary.

[29] Mr Henry Ling submitted that his clients had to publish that notification because the plaintiffs' attacks and criticism of his clients in the newspapers were done with "bad motive using dirty tactics" to serve their own "ends" against the society and that the notification was the best way to defend the interest and protect the integrity and reputation of the Executive Committee. He further submitted that the words used in the notification were fair and reasonable, done in good faith and without malice.

[30] The very first thing I must do, in relation to this issue is to apply the test or ask the question formulated by Green LJ in *Watt v. Longsdon* [1930] 1 KB 130 at p. 153 which was applied by the Court of Appeal sitting in Kuching in the old case of *Sarawak Time Ltd & Ors v. Tan Too Yam* [1960-1963] SCR 221. The test is worded this way:

> Would the great mass of right-minded men in the position of the defendant had considered it their duty, under the circumstances, to make the communication.

[31] I would have to answer that question with a "yes" because the plaintiff have not just raised the issues of the membership application and the use of the hall at the press conference but have demanded, as shown in exh. D12 (7) and exh. D9 (T1), the English translation of the news article from United Daily News and See Hua Daily News, for an explanation from the Executive Committee on these issues. There was therefore a duty, and a right minded person in their shoes should explain the defendants' stand on the issues raised.

[32] The next question which I must then asked myself is in responding in the like manner, ie, by going to the press, have the defendants transgressed the realm of a proper reply by making "counter-charges or unnecessary imputation" as cautioned by the learned author whom I have quoted earlier?

[33] When mulling that question, I must say that the last sentence in the notification indeed profess to do just that, I mean giving a proper reply, when it states, and I quote again:

> It is hereby announced, so as to set the record straight.

Unfortunately, the tone was not set right in the first opening paragraph of that notification because instead of just explaining that the forms were improper, the defendants accused the plaintiffs of causing 'misunderstanding', creating 'dissatisfaction' and 'hatred among villagers of Siburan'. The negative imputations of this statement on the characters of the plaintiffs in that reply is in my view, wholly unnecessary and irrelevant to the vindication as cautioned by the learned author Gatley which have quoted earlier.

[34] Mr Chong Siew Chiang has also raised in his submission, s. 12(3) of the Defamation Act 1957 which provides that in respect of the defence qualified privilege:

> (3) Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter or of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.

[35] He submitted, relying on *DP Vijandran v. Karpal Singh & Ors* [2000] 6 CLJ 433; [2000] 3 MLJ 22 that the court must distinguish between "that which the public is interested in" which the court will not protect with "which is in the public interest" ie, for the benefit of the public which the courts would.

[36] In this case, I could not help but say that because of the press conference held by the plaintiffs, the notification was a matter which is in the public interest and this reasoning I would add is in accord with the citation by Mr Henry Ling of the number of case authorities, ie, *Loveday v. Sun Newspapers* [1938] 59 CLR 503, *Penton v. Calwell* [1945] 70 CLR 219 and *Harbour Radio Pty Limited v. Trad* [2012] HCA 44, which acknowledged that a person under attack in public has a corresponding right to defend himself also in public. The publication of that defence in public is made in an occasion which is privilege but in the context of this case, when that defence comes outside the ambit of a proper reply as I said earlier, then I am of the view that the privilege is lost. I am moved to end a discussion on this issue with this relevant quote from what Lord Oaksey said in *Turner v. MGM Pictures Ltd* [1950] 1 All ER 449 which was also reproduced in Yusoff J's judgment in *Henry Wong v. John Lee & Anor* [1980] 1 LNS 27; [1980] 2 MLJ 254, one of the cases cited by Mr Henry Ling to me. His Lordship said:

> There is, it seems to me, an analogy between the criminal law of self-defence and a man's right to defend **himself against written or verbal attacks.** In both cases he is entitled, if he can, to defend himself effectively, and **he only loses the protection of the law if he goes beyond defence and proceeds to offence.** That is to say, the circumstances in which he defends himself, either by acts or by words, negative the malice which the law draws from violent acts or defamatory words. (emphasis added)

[37] Regrettably, although I must add quickly add that the anger of the defendants is understandable, they should not have gone on the offensive with their choice of words in the first paragraph of the notification.

[38] Since my decision is that the defence of qualified privilege fails, the issue of malice in the publication is irrelevant. However, assuming that the said defence succeeds what I would say about it, ie, malice would have to wait until after I have determine the defence of fair comment as malice is relevant to defeat both defences.

Fair Comment

[39] Mr Chong Siew Chiang has outlined in his written submission four ingredients which the defendants must established to succeed in their defence of fair comment, following *Chok Foo Choo*'s case (*supra*) which he submitted they have failed to do. Since I agree with him that these four ingredients are essential to the establishment of the said defence, I must list them out in this judgment and couched in words relevant to this case, they are:

(i) That the words in the notification was on a matter of public interest.

(ii) That the words in the notification were not statement of facts but comment.

(iii) The facts upon which the comment was based were true.

(iv) The words in the notification were fair.

A Matter Of Public Interest

[40] I have earlier on commented that the plaintiffs' press conference airing their grievances about the Executive Committee deserved a public reply from the defendants and I agree that it is their duty, to use their own words, "to set the record straight".

[41] However, whilst the public has the right to know the true facts, the defendants' freedom of speech does not extend to making scurrilous attacks against the plaintiffs. The public is not entitled to know what has been alleged against the plaintiffs in the first paragraph of that notification. In other words, the public interest element fails.

Allegation Of Facts, Not Comment

[42] On this issue, I first agree with Mr Henry Ling that although two of the defendants witnesses ie, Phang Nam Fatt (DW3) and Chung Chou Dhin (DW8) agreed in their cross-examination that para. 1 of the notification were statement of facts, whether they were so is a question of law which I must answer – not the witnesses.

[43] However, following the Federal Court's decision in *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2; [1965] 1 MLJ 142 which held that the allegation of disgraceful conduct committed by the plaintiff is an allegation of fact which could only be defended by a plea of justification but not comment, I am bound to apply the same principle here to the detriment of the defendants. The words in para. 1 of the notification were clearly allegation of facts made against the plaintiffs for causing dissension and inciting hatred amongst the people of Siburan against the Executive Committee. Justification was of course not pleaded by the defendants. What they have pleaded instead in para. 12 of their amended defence was a rolled up plea in that in so far as the words complained consist of statements of facts, they were true in substance and in fact but where they consist of expression of opinion, then these were fair comments. I have earlier in an interlocutory ruling held that the said "rolled plea" was a defence of fair comment. Thus the defendants could not escape the rigours of proving fair comment demanded by the law.

A **True Facts**

[44] Mr Chong Siew Chiang has shown in pp. 45 to 51 of his written submission that what was stated in para. 2 of the notification were not true and what were untrue are these, said he:

B (i) The membership's forms were not issued by the Executive Committee and did not bear its seal.

(ii) The applicants voluntarily took back their RM100 membership subscription fee.

C (iii) The Executive Committee executed their administrative and financial matters according to the rules and constitution of the society.

(iv) Chong Jit Leong had made a misleading statement in the International Times dated 25 July 2010 and claimed to take legal D action against the committee within seven days.

[45] I agree with Mr Chong Siew Chiang that the statements could not be true because the application forms exhibited in the plaintiff's bundle of document, bundle E, clearly show the seal of the society with the proposer and seconder from the Executive Committee such as E Jee Nyen Chong, Voon Sam Ted, Bong Kin Seng and Thian Pian Choi (the then treasurer). What has also not been proven at the trial by the defendants were the villagers' feelings of dissatisfaction and hatred against the defendants as stated in para. I of the notification. As for the voluntary taking back of the membership fees it is only half a truth F because the plaintiff's witnesses, Lee Boo Hiung (PW5) Phun Teck Chew (PW6) and Chang Hon Hiung testified that they were told that if they did not take back their fees, the money would be donated to a charity of the Executive Committee's choice.

G **[46]** In respect of the third statement, I am not convinced that the Executive Committee did not follow the rules and regulation of the society as submitted by Mr Chong Siew Chiang. They have, I agree taken their time to consider the application for the new membership although r. 3 (b) provides the secretary must forward the application to the Executive Committee "at the first convenient opportunity" but it did H not say that the approval must be prompt and the discretionary power to reject the application is given to them without having to assign any reason as stated in the said rule.

[47] As for the use of the hall by Democratic Action Party (DAP) I which was rejected which shows, said Mr Chong Siew Chiang that the use of the hall was not open to all and was a discriminatory exercise of power by the Executive Committee, the rejection was satisfactorily

explained by Phang Nam Fatt (DW3) who was a vice-treasurer of the society at that material time. He testified that when Phun Teck Chew made the application to use the hall, he said it was to hold a birthday party for his mother but later Voon Sam Ted found out that it was to hold DAP's dinner to celebrate the formation of its Mambong branch. At any rate, this rejection is immaterial and irrelevant because it was an event which happened in September/October 2011, way after the notification had been published, Mr Chong Siew Chiang himself has submitted, based on, *inter alia*, *Cohen v. Daily Telegraph Ltd* [1968] 2 All ER 409 that subsequent events or knowledge of the facts are not admissible to support the plea of fair comment and I wish to add, nor to defeat it. It is the conduct of the parties at that material time which the court must consider, not one which is too for remove from it both in time and sequence of events.

[48] However, the falsity of the other two earlier statements are sufficient in my view, to defeat the defence of fair comment and after saying this I must mention that the citation of *Kimsley v. Foot* [1952] AC 345 by Mr Henry Ling to support his contention that even if one fact was proved to support the comment but not the others, the said defence still could succeed, cannot be applied in this case. The simple reason is when Lord Porter made that statement at p. 357 of the report, His Lordship was dealing with facts not found in the alleged libel "**but in particulars delivered in the course of action**". (emphasis added). Lord Tucker made the same observation at p. 362 of the report that "where the facts relied on to justify the comment are contained only in **particulars**, it is not incumbent on the defendant to prove the truth of every fact so stated in order to establish his plea of fair comment". (emphasis added)

[49] I would conclude this issue by lifting the same quote made by Lord Parker from the judgment of Kennedy J in *Joynt v. Cycle Trade Publishing Co* [1904] 2 KB 292 at p. 294 that "a comment cannot be fair which is built up on facts which are not truly stated".

[50] As I have promised earlier in the judgment and despite the failure of the defences of qualified privilege and fair comment, I would now consider whether there was malice on the part of the defendants in drawing up and publishing the notification. Malice, of course is only necessary to be proved if the two defences have been successfully raised by the defendants.

A **Malice**

[51] Mr Chong Siew Chiang in his written submission has portrayed the defendants as desperados (my word, not his) who wanted to cling to power, afraid that the influx of new members would dethrone them from their seats of power (my words again, not his). Their motive in
B publishing the notification, said he was to "injure the plaintiffs' reputation for the purpose of attaining their private and selfish gain", that "gain" being the power to manage the society and control the use of the hall. For added measure, he further submitted that the calling of twenty one witnesses by the defendants and the lengthy trial of 30 days are further
C proof of the defendants' desire to "blacken the plaintiffs' character".

[52] Mr Henry Ling, on the other hand, highlighted the evidence of both Chung Chou Sin (DW8) and Voon Sam Ted that the notification was made honestly and in good faith to answer the "hostile criticisms"
D made by the plaintiffs against the Executive Committee. He cited the case of *Joseph & Others v. Spiller & Anor* [2010] 3 WLR 1791, a decision of the Supreme Court of England in which Their Lordships advocated that the defence of fair comment be renamed "honest comment" and for the proof of "public interest" in that defence be dropped.

E **[53]** Though I have decided to consider this issue of malice to demolish both the defences of qualified privilege and fair comment, I am aware that malice for one is not the same as malice for the other. Unlike in a defence of qualified privilege, for malice in fair comment, the plaintiffs need not prove motive for the publication and "all that mattered
F was whether or not the commentator believed in the truth of his comment" (per Lord Phillips in *Joseph*'s case (*supra*) at p. 1812).

[54] When raised in a defence of qualified privilege, malice can be defeated said Lord Nicholls in *Albert Cheng & Lam Yuk Wah v. Tse Wai Chun Paul* [2000] 3 HKCCFAR 339 at p. 361, "by proof that the defendant used
G the occasion for some purpose other than that for which the occasion was privileged". What I am about to say next would cover both the motive (or the absence of it) and the honesty in making the notification.

[55] Whilst I totally agree with Mr Chong Siew Chiang that this has
H been a long drawn trial and not only now when I laboured over this judgment but more so then during the trial, wished that it was over in a week, I cannot adversely comment on the defendants need to call so many witnesses as I would, also their need to publish the notification.

[56] The Executive Committee was under siege. Their management of
I the society has been questioned in the press conference. Their right to the freedom of speech allowed them to make a rebuttal using the same channel as the attack launched against them by the plaintiffs, ie, in the

newspapers. I do not, for a second, doubt their honest belief in making that rebuttal nor do I see their conduct in doing so as an expression of ill-will against the plaintiffs. Lord Nicholls in *Reynolds v. Times Newpapers Ltd* [2001] 2 AC 127 at p. 201 has a good line to describe such a right and it is that:

> Freedom of speech does not embrace the freedom to make defamatory statements out of personal spite or without having a positive belief in their truth.

[57] I would think that in this case there is the absence of the former, personal spite and the presence of the latter, that is positive belief in the truth of the statement that is in so far as proof of malice is concerned.

[58] However, since I have decided that the twin defences have failed, below is my assessment of the damages.

Damages For Liu Thian Leong

[59] He is the more prominent of the three plaintiffs, actively involved in the management of five private limited companies and various associations be it political, social and educational in his village and in the Kuching Saramahan Division. I do not wish to list them all out but Mr Chong Siew Chiang has reproduced them in p. 68 of his written submission and has submitted that the sum of RM100,000 should be compensation for the defamation. But, in considering the quantum I must not be guided solely by his standing in society but the extent of the publication as well which undisputedly was only carried by two local Chinese newspapers and with respect, would be generating interest primarily within the people of Siburan. This last consideration holds true not just for him but the other plaintiffs as well. Further, though active in all the six organisations listed by his counsel, the majority of these organisation are localised in the said area, not state or nation wide. Further more, the sting of the accusation in para. 1 of the notification was not so grave and serious as, for example, to be accused of a criminal offence such as murder or robbery. Again this consideration applies to the other two plaintiffs too. With all these considerations in mind, I am of the view that damages of RM60,000 be sufficient to compensate Liu Thian Leong for his injured feelings and reputation following the notification.

Damages For Chong Jit Leong

[60] Chong Jit Leong held various positions in six organisations, mostly in Siburan and had a trading company there as well. Again these

organisation are listed in Mr Chong Siew Chiang's written submission at p. 59. I would consider, as fair, a compensation of RM40,000 for him although his counsel submitted the sum of RM80,000.

Damages For Chang Hon Hiung

[61] Chang Hon Hiung was a director of a limited company and proprietor of two trading companies and involved in two organisations in Serian and Siburan. His counsel has submitted that a sum of RM80,000 be awarded to him but which would not be fair in the light of the scaled down awards handed to the earlier plaintiffs since his socio-economic standing is lesser than that of Liu Thian Leong. I would award the same compensation to him as Chong Jit Leong which is RM40,000.

[62] The defendants are therefore jointly and severally liable for the damages assessed and all the above awards are attached with the statutory interest at the rate of 5% per annum from the date of this judgment until full settlement.

Personal/Official Capacities Of The Defendants

[63] I have made a fleeting mention of this one last issue at the beginning of this judgment. Mr Henry Ling has submitted that the defendants could only be sued and be found liable in their official capacities as Executive Committee members but not in their personal capacities. He cited s. 9(c) of the Societies Act 1966 which provides that a society registered under the Act can sue and be sued in the name of its office-bearers. I have earlier at the interlocutory stage of the proceedings declined to determine if the defendants should have been just sued in their official capacities, holding that the issue must be decided only at the conclusion of the trial.

[64] Having heard the evidence, I am inclined to follow the decision of Stephen Chung JC (as His Lordship then was) in *Ling Kiong Tieng @ Ling Hie Sing v. Wong Lieng Kiong & Ors* [2010] 1 LNS 1759 that the defendants should not be made personally liable for the defamatory statement in the notification as right from the start the decision to publish it was a joint decision of the Executive Committee after Chang Chou Shin (DW8) raised it with them. Though the notification was drafted by Voon Sam Ted, the Executive Committee met and agreed with the draft – again it was a collective decision which in my view exonerated the defendants personally. Thus, my decision on the liability and the compensation to be paid are to be read in the light of the finding above.

Costs

[65] Mr Chong Siew Chiang submitted that the plaintiffs be entitled and the court should issue a certificate of costs for two counsels, given he said, the length of the trial and number of witnesses. With respect I cannot agree for this is in essence, a straight forward and simple libel action as Mr Chong Siew Chiang himself has labelled it. Though the defendants witnesses were so many, most of them did not have to stay in the witness stand for too long – the newspaper reporter, the editor of the newspaper, the translators of the articles, the mother and friend of the deceased basketballer and the three applicants, for example. Further, the cross-examination of the main witnesses such as the first and third defendants took a long time in itself. The other consideration is that the damages assessed is way below the jurisdiction of the High Court. Thus, I would in the given circumstances, fix cost collectively for all three actions at RM40,000.